IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 855 of 1994

with

CRIMINAL APPEAL No 1084 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

Criminal Appeal No. 855 of 1994

THAKOR DAYALSING DOHJI,
THAKOR MANDANSING DOHJI,
THAKOR BALVANTSING GUMANSING
.....Petitioners

Versus

STATE OF GUJARAT
.....Respondent

Criminal Appeal No. 1084 of 1994

STATE OF GUJARAT
.....Petitioner

V e r s u s
THAKOR BALVANTSING GUMANSING
.....Respondent

Appearance:
1. Criminal Appeal No. 855 of 1994
MR S.R.DIVETIA for MR RAJESH M AGRAWAL &
MS KRISHNA U MISHRA for Petitioner Nos. 1 to 3
MR K.G.SHETH, Addl.PUBLIC PROSECUTOR for Respondent
2. Criminal Appeal No. 1084 of 1994
MR K.G.SHETH, Addl.PUBLIC PROSECUTOR for Petitioner
MS SADHANA SAGAR for Respondent

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 03/08/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. These two appeals arise out of the judgment and order dated 3rd August, 1994 of the learned Addl. Sessions Judge, Banaskantha at Palanpur in Sessions Case no. 4 of 1993 by which the accused nos. 1 and 2 were convicted for the offences under Sec. 302 of the Indian Penal Code and both of them were sentenced to imprisonment for life and fine of Rs.5,000/-, in default to undergo simple imprisonment for a period of three months for the offence under Sec. 302 of the Indian Penal Code. The accused no. 1 was further convicted for the offence under Sec. 326 of the Indian Penal Code and sentenced to rigorous imprisonment for a period of five years and a fine of Rs.2,000/-, in default to undergo simple imprisonment for a further period of one month. The accused no. 3 was convicted for the offence under Sec. 326 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for a period of five years and a fine of Rs.2,000/-, in default to undergo simple imprisonment for a further period of one month.

2. Criminal Appeal No. 855 of 1994 has been preferred by all the three accused persons against their convictions while Criminal Appeal No. 1084 of 1994 has been filed by the State against the acquittal of the original accused no. 3 for the offence under Sec. 302

of the Indian Penal Code.

3. The prosecution case was that the accused no. 1 Dayalsing and the accused no. 2 Mandansing, who were real brothers, along with the accused no. 3 Balvantsing, who was their cousin brother, had, on 13th July, 1992 in the evening at about 6 o' clock, gone to the field of Fulsing who was their uncle where their cousin Thansing Dungarsing was ploughing the field bearing survey no. 74 and stopped him from ploughing the same. Thansing was asked to plough the field on hire basis by his cousin Ransing, son of Fulsing. At that time, Ransing was also present. All the three accused persons had come armed with swords. On hearing the exchange of words, Thansing's father Dungarsing and brother Champaksing came there from their adjoining field and Dungarsing asked the accused persons not to quarrel with his son Thansing as Thansing had come only at the instance of Ransing to plough the land and it was open for them to cultivate the same. The accused, thereupon, got excited and the accused no. 1 Dayalsing gave a sword blow on the forehead of Dungarsing and the accused no. 2 Mandansing also gave a sword blow on the right shoulder and scapular region of Dungarsing. Thereupon, Champaksing and Ransing intervened to save Dungarsing and, at that time, the accused no. 3 Balvantsing gave a sword blow to Champaksing on his head, as a result of which Champaksing fell down. The accused no. 1 Dayalsing also gave a sword blow to Champaksing on his left ankle. On the cries being raised by the complainant Thansing, his younger brother Vijesing came there and thereafter all the three accused persons ran away towards their village with swords in their hands. The complainant Thansing, thereafter, took his father Dungarsing and brother Champaksing to the hospital in a tractor, where Dungarsing was declared dead while Champaksing was admitted for treatment. Thansing, thereafter, proceeded to file his complaint exh. 13.

3.1. The charges were framed against the accused persons at exh. 3 as per which the accused nos. 1 and 2 were charged for the offence under Sec. 302 of the Indian Penal Code for having intentionally caused death of Dungarsing by giving him sword blows. All the accused were charged for the offence under Sec. 307 read with Sec. 34 in respect of the sword injuries caused by the accused nos. 1 and 3 to Champaksing. All the accused were also charged for the offences under Sec.302 and Sec. 307 read with Sec. 34 of the Indian Penal Code on the allegation that they had done the criminal act of intentionally causing death of Dungarsing by giving him

sword blows and causing grievous hurt in an attempt to murder Champaksing by giving him sword blows, in furtherance of common intention of all the accused persons. The accused were also charged for the offence under Sec. 135 of the Bombay Police Act for having carried swords in violation of the notification, prohibiting carrying of weapons in public places.

4. The defence of all the three accused persons, in their statements under Sec. 313 of the Criminal Procedure Code, was of total denial. However, the defence which emerges from the cross-examination of these witnesses, was that the field bearing survey no. 74 was handed over in the past to the accused nos. 1 and 2 and they were actually cultivating the same. When they saw Thansing ploughing the field with his tractor, they asked him not to do so. According to the defence version, thereupon, Dungarsing and his sons Champaksing and Thansing as well as Ransing attacked the accused persons with an axe and lathis, as a result of which they received injuries and Haliba-mother of the accused nos. 1 and 2 also received a fracture in her hand in trying to ward off a blow aimed by Dungarsing. The defence version also was that in the past, about five to six years prior to this incident, Dungarsing had given a stick blow to Haliba. The defence version in short was that the accused were trying to protect their property from the complainant and his party and when they attacked these accused persons, they tried to defend themselves with "vansis" which Haliba and Kasumba had brought for felling the branches of trees to feed their cattle.

5. The trial court, on the basis of the material on record, held that all the accused had on 13th July, 1992, armed with swords gone to the field of Fulsing at about 6 O' clock in the evening and attacked the complainant and the accused nos. 1 and 2 intentionally caused death of Dungarsing by giving sword blows, while the accused nos. 1 and 3 caused grievous hurt to Champaksing by giving him sword blows. The trial court negatived the defence version that they were acting in private defence. It appears that the cross-case which was filed by these three accused persons on the strength of the F.I.R., a copy of which is at exh. 51 of the present proceedings, was also heard and decided on 3rd August, 1994 by the learned trial Judge and in that case, Thansing, Ransing and Champaksing were all acquitted for the offences under Secs. 323, 324, 504 read with Sec. 114 of the Indian Penal Code with which they were charged.

6. The learned counsel appearing for the

appellants-accused persons contended that there was ample material on record to indicate that all the three accused persons had acted in order to exercise their right of private defence of their property when they prevented Thansing from ploughing the field which, according to the accused persons, was in their possession. It was submitted that when Thansing was ploughing the field with his tractor at the instance of Ransing, the accused persons became entitled to defend their property by ousting Thansing and others. It was submitted that Thansing, Ransing and others were trying to take forcible possession of the said field and therefore the accused persons were justified in preventing them from doing so. It was submitted that once it is held that the accused persons were exercising their right of private defence, the case would fall within the general exception under Sec. 97 read with Sec. 96 of the Indian Penal Code. The counsel further contended that the material on record indicates that there was a sudden quarrel and a fight between the rival groups which resulted in injuries on both the sides. It was submitted that the learned trial Judge has not taken into account this aspect and has not considered the applicability of Exception 4 to Sec. 300 of the Indian Penal Code. It was also submitted that the version of the eye witnesses was inconsistent and there were material improvements made by them before the court which indicated that the prosecution version cannot be safely relied upon. It was also submitted that the prosecution has not been able to explain the injuries which were caused to the accused persons.

6.1. In support of his contentions, the learned counsel relied upon the decision of the Supreme Court in the case of Ram Phal and others V/s State of Haryana reported in A.I.R.1993 S.C.1979, where, in a case in which the accused persons received a number of injuries and some of which on vital parts and no plausible explanation was given by the prosecution, the Supreme Court held that in such a situation the plea put forward by the accused that they acted in exercise of their right of private defence cannot be rejected. The accused were, therefore, given benefit of doubt. Reliance was also placed on Kesha and others V/s State of Rajasthan reported in A.I.R. 1993 S.C. 2651 in which it was held by the Supreme Court that it is the duty of the prosecution to explain the injuries on the accused persons, and, in case where the accused set a plea of self-defence and relied on the medical evidence in support of the fact that they had injuries on their persons and thus justify their right of self-defence, that creats a doubt.

7. The learned Additional Public Prosecutor strongly contended that the eye witnesses have given the correct account of the prosecution version as per which all the three accused had come to the field of Fulsing armed with open swords which indicated that their attack was premeditated. It was submitted that the version of the eye witnesses was corroborated by medical evidence and also by the discovery panchanama as well as the report of the medical analyzer and the serologist. It was argued that the acquittal of the original accused no. 3 for the offence under Sec. 302 of the Indian Penal Code was not at all justified in view of the concerted manner in which all the accused had acted. It was submitted that even the accused no. 3 had participated in the crime and was constructively liable for the murder of Dungarsing, which had resulted due to the sword blows inflicted by the accused nos. 1 and 2. The learned counsel also argued that there was no question of any right of private defence being exercised because the accused persons have not been able to bring on record anything which would suggest that they were in possession of the field in question which, as per the prosecution evidence, was running in the name of Fulsing. It was submitted that there was absolutely nothing to suggest that Dungarsing or Thansing were trying to dispossess the accused persons of the said field. The learned counsel further argued that in view of the cruel manner in which the three accused acted by using their swords on their own kith and kin, they were not entitled to the benefit of Exception 4 to Sec. 300 of the Indian Penal Code. The learned counsel, therefore, submitted that while confirming the decision of the trial court in respect of the original accused nos. 1 and 2 as well as the conviction of accused nos. 1 and 3 for the offence under Sec. 326 of the Indian Penal Code, the acquittal appeal should be allowed against the accused no. 3 and he should also be convicted for the offence under Sec. 302 read with Sec. 34 of the Indian Penal Code.

7.1. The learned Additional Public Prosecutor relied upon the decision in case of Munshi Ram and others V/s Delhi Administration reported in A.I.R. 1968 Supreme Court 702, in which it was held that the possession which a trespasser is entitled to defend against the rightful owner must be a settled possession extending over a sufficiently long period and acquiesced in by the true owner. In the same decision, it was held that it is well settled that even if an accused does not plead self-defence, it is open to the court to consider such a plea, if the same arises from the material on record, and

the burden of establishing that plea is on the accused, which can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

7.2. The learned counsel also relied upon the decision of the Supreme Court in case of Ramashish Yadav and others V/s State of Bihar reported in 2000 S.C.C.(Cri.) 9 in which in context of the provisions of Sec. 34 of the Indian Penal Code, it was held that prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be prearrangement or premeditated concert.

8. The incident is said to have occurred on 13th July, 1992 in the evening at 6 O' clock in the field of Fulsing. The map of the scene of offence is at exh. 40. It was prepared by the Circle Inspector Nathubhai of the Vadgam Village Panchayat who, in his deposition exh. 39, has stated that the said survey no. 74 runs in the name of Fulsing Hemsing. In his cross-examination, he has denied the suggestion that he had no personal knowledge about the possession of that field. The accused persons have tried to raise a plea that in the past, in 1966, the possession of that field was handed over to them, but have not been able to establish the same. The incident occurred because the complainant Thansing had started ploughing the said field at the instance of his cousin Ransing Fulsing. In his deposition exh. 12, the complainant Thansing has stated that the incident took place on 13th July, 1992 in the evening at about 6 O' clock. Prior to that he was ploughing his own field when his cousin Ransing had requested him to plough his field also. He, therefore, went with his tractor in that adjoining field survey no. 74 for ploughing it. While this witness was doing so, the accused nos. 1,2 and 3 came there and stopped his tractor telling him that this field was to be cultivated by them. All the accused persons were also his cousins. He stopped the tractor at their instance. According to him, all the three accused persons were having swords in their hands. Though they quarrelled with him over the ploughing of the field, this witness did not say anything. In the meanwhile, his father Dungarsing who was in the adjoining field came there and told the accused persons that whoever wanted to cultivate the field may do so but they should not quarrel with this witness Thansing. Thereupon, the accused no. 1 Dayalsing gave a sword blow on the forehead of his

father Dungarsing. Thereafter, the accused no. 2 Mandansing also inflicted a sword blow on the right scapular region of Dungarsing. Thereafter, this witness, his brother Champaksing and Ransing intervened to save Dungarsing. At that time, the accused no. 3 Balvantsing gave a sword blow to Champaksing on his head and thereafter the accused no. 1 Dayalsing gave a sword blow to Champaksing on his left ankle. Thereafter, when this witness raised cries, the accused persons ran away from the spot with their swords towards the village. Thereafter, Dungarsing and Champaksing were carried from the field in a tractor and then from the bus stand in a jeep and taken to Civil Hospital at Palanpur where the doctor declared that his father Dungarsing was dead. Thereafter, he had gone to lodge the F.I.R. to Palanpur police station where he was directed to go to Vadgam police station within whose jurisdiction the offence had taken place and he therefore went to Vadgam and lodged the F.I.R. exh. 13 at 12 O'clock in the midnight. In his cross-examination, he has denied that any part of survey no. 74 belong to the accused persons. In para 10 of his deposition, he has admitted that Dungarsing was having a walking stick. He has stated that the accused persons had an altercation with him but none of the accused persons had beaten him till his father came there from the land bearing survey no. 73. He has admitted that none of the accused had beaten Ransing till his father reached there. His father and Champaksing had come together. He then admitted that throughout the incident, the accused had not beaten him nor was Ransing beaten by any of them. He has denied the suggestion that his father Dungarsing along with this witness, Ransing and Champaksing had come to dispossess the accused persons of survey no. 74. He has also denied that Champaksing was having an axe and others were having sticks at that time. He has further denied that when they were trying to take the possession of survey no. 74, Haliba, mother of the accused no. 1 had asked Ganpatsing, who is the son of accused no. 1 to call the accused no. 1. It is denied that when the three accused persons came there, this witness, his father Dungarsisng, Champaksing and Ransing got excited and that Champaksing gave an axe blow on the right arm of the accused no. 1 Dayalsing. It is also denied that Dungarsing had given a stick blow on the head of accused no. 2 Mandansing and that Champaksing had given an axe blow to Mandansing. He has denied the suggestion that he gave a stick blow to Balvantsing or that he and his father Dungarsing had given a stick blow to Haliba and caused fracture in her hand. It is denied that since the accused persons had felt that the complainant's party intended to kill them,

they took "vansis" and wielded them in self-defence and in that process, Dungarsing and Champaksing were injured. This witness denied the suggestion that if the accused had not acted in self-defence, the complainant's party would have killed them. This witness admitted the suggestion that about five to seven years prior to this incident, his father Dungarsing had broken the hand of Haliba and a complaint was filed in that regard. From the tenor of the cross-examination of this witness, it becomes abundantly clear that the accused are not disputing their presence at the time of the incident nor are they disputing the incident itself. According to them, they had acted in self-defence by wielding the "vansis" fearing that otherwise they would have been killed by the complainant's party. "Vansi" was explained to us at the Bar to be an instrument which has a long pole with a blade for cutting down small branches or leaves from a tree for feeding the cattle. There are no "vansis" recovered in these proceedings. Moreover, though as per the defence version Haliba and Kasumba were having "vansis", all the three accused persons are said to be having swords and three swords have been recovered from their residences. The complainant's version that these three accused persons had come at the place of the incident armed with swords and that they caused injuries with their swords is fully corroborated by his F.I.R. exh. 13 which was lodged by him at midnight, after the incident.

8.1. From the deposition of Thansing, it transpires that when he was ploughing the field of Ransing Fulsing at his request, in the evening at about 6 O' clock on 13th July, 1992, these three accused persons had come there armed with open swords and stopped him from ploughing the field. When they were asked by Dungarsing, father of this witness, not to quarrel with him, the accused no. 1 Dayalsing gave a sword blow on the forehead of Dungarsing and the accused no. 2 gave a blow with his sword on the right scapular region of Dungarsing. The accused no. 3, thereafter, gave a sword blow on the head of Champaksing and the accused no. 1 also gave him a blow with his sword. The injuries corresponding to all these blows are borne out from the medical evidence.

9. Dr.Jashwantsingh Jadeja in his deposition exh. 17 has stated that he had performed the post-mortem examination on the body of Dungarsing at 9 O' clock on 14th July, 1992. He has described the external and internal injuries which were found on the body of Dungarsing and proved the post-mortem notes exh. 18. In

column no. 17 of the post-mortem notes exh. 18, the following external injuries found on the body of Dungarsing were noted :

" 1. About 7 x 1 cm. x bone cut incised wound on right side fronto-parietal, oblique and 5 cm. above right eye.
2. About 20 x 4 cm. x muscle And Arteries and Veins cut, incised wound on right shoulder posterior upto upper and lateral chest wall lateral of humerus to chest wall.
3. About 3 x 1 cm x muscle deep incised wound on right wrist joint laterally
4. About 5 x 1 cm. x muscle deep cut on right leg 10 cm. below knee joint laterally.
5. About 5.5 x 1cm. x muscle deep cut on right leg laterally just about ankle joint.
6. Fracture on right frontal and parietal bone
7. Fracture on right humerus and scapula "

9.1. As stated by Dr.Jadeja in para 8 of his deposition, the injuries no. 1 and 2 were both sufficient in the ordinary course of nature to cause death. All the injuries were ante-mortem. He has stated that the injuries no. 1, 2 and 3 could be caused by sword blows and injuries no. 3, 4 and 5 were possible by a sharp cutting instrument.

9.2. Dr.Dipak Pranami, in his deposition, exh. 43 has proved the injuries which were found by him while examining Champakbhai at 7.40 p.m. on 13th July, 1992 and has proved the certificate exh. 45 which was issued by him, in respect of these injuries. The certificate exh. 45 show that the following injuries were found by the medical expert on Champaksing.

" 1. Incised wound over left parietal region of scalp about 4" x 1/2" size bone deep, bleeding present transverte in direction
2. Incised wound over right forearm on posterior aspect about 2cm x 1cm size skin deep
3. Incised wound over base of right great toe about 3 cm x 1cm size, muscle deep, bleeding present
4. Large cut wound about 3" x 1/2" size over lateral aspect of left ankle, bleeding present
- capsule of ankle cut
- sharp cut in talus bone body (left)
- tip of lateral mallealus fractured
- X-ray no. L4038 shows :
Cut fracture talus bone

fracture lateral mallealus

All these injuries were possible by a sharp cutting instrument. Dr.Pranami has stated that these injuries were possible by weapons like sword. He has stated that none of these injuries were found on any vital parts of the body of Champaksing and the injuries were not likely to result in his death. A contention was raised that in the medical certificate exh. 45 and in the deposition of Dr.Pranami, it has been mentioned that while giving history of the injury, the doctor was told that the injuries were caused by a "dharia" blow and this aspect created doubt over the version of the prosecution witnesses that the injuries were caused by sword blows. As can be seen from the deposition of Champaksing, he has denied having mentioned that the injuries were caused by "dharia" blow. Even the defence version which is suggested in the cross-examination of witnesses is that the accused persons took "vansis" from the hands of Haliba and Kasumba and wielded them which resulted in some injuries to Dungarsing and Champaksing and it was not the defence version that "dharia" blows were given to them. All the eye witnesses are consistent on the aspect that the three accused had swords in their hands and had inflicted injuries on Dungarsing and Champaksing with swords. Therefore, mention of "dharia" in the history recorded by the medical expert cannot override the positive version of eye witnesses as well as the medical opinion about the injuries having been caused by swords.

10. The injured witness Champaksing, in his deposition exh. 14, has stated that Ransing Fulsing had requested Thansing to plough his field with his tractor and therefore on that day i.e. on 13th July, 1992, Thansing had gone to the field known as Bathavala field (survey no. 74). When Thansing started ploughing the field of Ransing, all the three accused had come there with swords in their hands. Then the accused no. 1 questioned Thansing over ploughing of the field and had stated that the field was to be cultivated by them and the accused persons stopped the tractor. The father of this witness i.e. Dungarsing, thereafter, told them that it was the field of the owner, at whose instance they had come for ploughing and that they may cultivate it but they should not quarrel with Thansing. Thereupon, the accused no. 1 gave a sword blow on the head of his father i.e. Dungarsing and the accused no. 2 gave a sword blow on the right scapular region of Dungarsing who started bleeding and fell down. According to this witness, he, Ransing and Thansing, therefore intervened. The accused no. 3 Balvantsing gave a sword blow on his

head and therefore this witness started bleeding and fell down. At that time, the accused no. 1 Dayalsing gave a sword blow on his left ankle which started profusely bleeding. The accused no. 2 Mandansing gave a sword blow on his hand and his toe. As shouts were raised, the accused persons went away with their swords towards the village. Thereafter, Thansing and this witness were taken in a tractor and thereafter put in a jeep and taken to the civil hospital, Palanpur where his father was declared dead. Thansing had thereafter gone to file a complaint. He has identified the three swords which were used by the accused nos. 1,2 and 3 as the muddammal articles no. 15 to 17. In his cross-examination, he has stated that his father Dungarsing had come from their field to the field in which the incident took place on hearing the exchange of words. He stated that the accused persons were fighting with Ransing and Thansing but immediately corrected himself by saying that they were quarrelling with him and not fighting and that the fight had started after he and his father had reached that place. He has denied the suggestion that he was having an axe and others on his side were having sticks. He has, however, admitted that his father was having a walking stick. He has denied that he had given history before the doctor of blow by "dharia". He has denied the suggestion that because survey no. 74 was standing in the revenue record in the name of Ransing's occupation, he and his party had instigated him to take the possession. He has denied the defence suggestion that the accused persons tried to persuade them not to take forcible possession of the said field and thereupon this witness and his people were excited or that he had given a blow with an axe on the right arm of Dayalsing. He denied that Dungarsing had given a stick blow on the head of Mandansing or that this witness had given an axe blow on the waist of Mandansing. He has also denied that Ransing had given a stick blow to Balvantsing. He denied the suggestion that his father had aimed a stick blow on Haliba's head which fell on her hand as she was trying to protect herself and resulted in a fracture in her hand. He denied that the accused persons in their self-defence wielded "vansis" which they took from Haliba and Kasumba and injuries were caused to him and his father by the blades of "vansis" and their blunt part. This witness has stated that when he was taken to the hospital, he was in an unconscious state and came to his senses only in the early morning. This also explains the inaccuracy of describing the weapon with which the injuries were caused to him as "dharia", because, if he was not in his full senses, there might have been a mistake committed in recording the history at someone's instance when the

assault was described in the medical certificate as having been done by "dharia".

10.1. The injured witness Champaksing clearly supports the prosecution version on all material aspects and from his deposition, it transpires that all the three accused persons had swords in their hands and after stopping Thansing from ploughing the field of Ransing, when they were advised by Dungarsing not to quarrel with Thansing, the accused nos. 1 and 2 gave sword blows to Dungarsing and the accused no. 3 gave sword blow on the head of this witness Champaksing who was also given another sword blow by the accused no. 1 on his ankle after he fell down. After causing these injuries to Dungarsing and Champaksing, all the accused ran away together with their swords to their village. As noted above, the medical evidence fully supports the version of assault by swords on Dungarsing and Champaksing.

11. The third eye witness Ransing Fulsing has, in his deposition exh. 15, stated that survey no. 74 of village Andhariya is known as `Bhathavala' field and adjoining that field is the field of his uncle Dungarsing. All the accused persons were his cousins i.e. uncle's sons. On the day of the incident, he was in his field. The adjoining field of his uncle was being tilled by Thansing. He requested Thansing to plough his field on payment basis. Therefore, Thansing, after ploughing his own field had come to the field of this witness and had started ploughing it in the evening at about 6 O' clock. While Thansing was ploughing the field, these three accused persons had come with swords in their hands and had stopped Thansing's tractor. The accused no. 1 had said that he should not plough the field because they were to cultivate it. At that time, Dungarsing and Champaksing had come from the adjoining field and Dungarsing told the accused that they should not quarrel with the tractor owner and that they can take the land if they want because the tractor driver had come only for ploughing it on hire. At that time, all the three accused persons got excited and the accused no.1 gave a blow with his sword on the forehead of Dungarsing while the accused no. 2 Mandansing gave a blow with his sword to Dungarsing on his right scapular region. The accused no. 3 Balvantsing gave a sword blow to Champaksing on his head. The accused no. 1 had also given a sword blow to Champaksing on his ankle and the accused no. 3 Balvantsing gave another sword blow on his left toe. Thereafter, the accused persons had run away with their weapons. He has admitted that Mandansing and Balvantsing were injured by the stick which was wielded

by his uncle Dungarsing. He has also stated that while all the three accused persons were wielding their swords, they caused minor injuries to each other. In para 3 of his deposition, he stated that the accused persons wanted to take the field which belonged to him and was running in the name of his father. He has stated that the said field was in his possession. In his cross-examination, he has stated that after Thansing was stopped from ploughing his field, Thansing had taken his tractor to his own field. He has stated that he was not beaten by the accused persons when he was alone in his field and that the accused persons had not also beaten Thansing. He has stated that when Dungarsing was given sword blow by the accused on his head, he had started wielding his stick and that this witness does not know as to who was injured by that stick. According to him, when the fight started, he and Thansing had intervened but no injury was caused to him and Thansing. According to him, the accused persons were wielding their swords even after his uncle Dungarsing and Champaksing fell down and they were not allowing him and Thansing to go nearer Dungarsing. He has denied the defence version which was repeated to him in his cross-examination suggesting that the accused persons had acted in private defence of their property and person. He has admitted in his cross-examination that the relations between the accused persons and Dungarsing were estranged.

11.1. The version of witness Ransing also fully supports the prosecution case about the accused persons having come with swords at his field and their stopping Thansing from ploughing the field and on being asked by Dungarsing not to quarrel with Thansing, the accused nos. 1 and 2 having given sword blows to Dungarsing and accused nos. 1 and 3 having given sword blows to Champaksing and thereafter their running away with their swords towards the village.

12. From the deposition of panch witnesses, Dhoodsing Talsing exh. 20, it is borne out that the clothes of the accused no. 1 Dayalsing were seized under the panchanama exh. 26 and that they were having blood stains. It is also borne out from his deposition that Dayalsing had produced a sword, muddammal article no. 15 from his house under the panchanama exh. 29. This witness has also proved the muddammal article no. 16-sword which was seized under the panchanama exh. 31 by the accused no. 2. He has also stated that the muddammal article no. 17-sword was seized under a panchanama in his presence and has proved the panchanama exh. 33. Exh. 56 is the report of Chemical Analyzer and Serologist. The

swordsmuddammal article nos. 15, 16 and 17 were found to be having human blood, though the blood group was inconclusive. The clothes which were attached were also found to be having human blood. The muddammal article no. 14-dhoti was having human blood of Group `B' which was the group of the blood of the deceased.

13. The oral and documentary evidence on the record of this case, in our opinion, satisfactorily establishes the involvement of all the three accused persons in the crime and conclusively shows that the accused nos. 1 and 2 had inflicted blows with their swords on the head and right scapular region of Dungarsing and each of these two blows were sufficient in the ordinary course of nature to cause death of Dungarsing. It is also satisfactorily established that Champaksing was given a sword blow on his head and toe by the accused no. 3 and the accused no.1 also gave him another sword blow on his ankle after he fell down. All the injuries which are mentioned in the medical evidence were thus caused by these accused persons to Dungarsing and Champaksing.

14. According to the defence version, the accused persons were acting in exercise of their right of private defence and were trying to stop the complainant and his party from dispossessing them of their field bearing survey no. 74. As noted above, and as rightly held by the trial court, the accused have not been able to establish even a prima facie right over the field and the revenue record shows that the field was in the name of Fulsing, father of Ransing. The starting point of the episode was when the accused stopped the tractor of Thansing while he was ploughing the field at the instance of Ransing Fulsing. It is not the defence version that Thansing or Ransing or their party had committed any act in respect of the said field which was an offence falling under the definition of theft, robbery, mischief or criminal trespass, or an attempt to commit such offences. Mere trespass in a field without it being a criminal trespass will not entitle a person to exercise right of private defence. As provided in Sec. 97 of the Indian Penal Code, every person has a right, subject to the restrictions contained in section 99, to defend the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass. It is not the case of the defence that the complainant and his party were committing theft or robbery or mischief. Mere trespass, without anything more is not a criminal

trespass because criminal trespass, as defined under Sec. 441 of the Indian Penal Code takes place when a person enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. No intimidation, insult or annoyance was alleged against Thansing and Ransing when Thansing was ploughing the field of Ransing with his tractor. The possession of the property in question is not shown to have been with the accused persons. Therefore, there was no scope for pleading private defence of property in this case by way of an exception and the learned trial Judge was therefore justified in negativing the defence version.

15. The question, however, remains as to whether there are any attenuating circumstances which would bring the offence committed by the accused persons within the ambit of Exception 4 of Sec. 300 of the Indian Penal Code. Under the said provision, culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner. As per explanation to Exception 4, it is immaterial in such cases which party offers the provocation or commits the first assault. It appears from the version of the eye witnesses that even though all the three accused had come with swords in their hands, they had not caused any harm to Thansing who was ploughing the field nor did they cause any harm to Ransing who was claiming to be the owner of the field and who had hired Thansing to plough his field with his tractor. There is no indication of any violence by the accused persons against Thansing and Ransing. The fight started after Dungarsing came to the spot along with Champaksing and when Dungarsing asked the accused not to quarrel with his son Thansing. The eye witnesses have stated that Dungarsing was having a stick and as stated by Ransing, there was exchange of words and then fight took place after Dungarsing and Champaksing reached the spot when Dungarsing wielded his stick. There indeed was a quarrel over the ploughing of the field. The accused persons could not have earlier known about the ploughing of the field because, as per the version of the eye witnesses, Ransing had on that evening itself requested Thansing to plough his field also. Therefore, the quarrel over ploughing of the field appears to have suddenly cropped up and passions started running high when Dungarsing advised the accused persons not to quarrel with his son Thansing and a fight ensued in which even the accused persons were injured. The medical certificate exh. 57 shows that the accused no.

3 Balvantsing had received one contused lacerated wound on right occipital region of his scalp and a contused lacerated would on his left face near the eye brow. He had also received a bruise with diffuse swelling on anterior left chest. The medical certificate exh. 58 shows that the accused no. 2 Mandansing had one incise wound on the right occipital region of his scalp oblique in direction of the size of 6 cm x 1/2cm bone deep and that such injury could be caused by a sharp cutting substance. According to the defence version, Champaksing was having an axe and he had given a blow with that axe to the accused. The medical certificate exh. 59 shows that the accused no. 1 Dayalsing had also incised wound and an abrased contusion and that injury no. 1 was possible by a sharp cutting instrument while the injury no. 2 could be caused by a hard and blunt substance. We also note that the medical certificate of Haluba which is at exh. 67 shows that she was brought in the hospital on 13th July, 1992 at 9.30 p.m. and she had a bruise and diffused swelling on her left forearm above the wrist joint and a fracture of radius ulna. She also had a bruise on the right wrist. These injuries were possible by a hard and blunt substance. The learned trial Judge has not attached due importance to these injuries caused to the accused persons and their mother Haluba Dohji. The defence witness Haluba Dohji, in her deposition exh. 64, has stated that Champaksing had given a blow with an axe to the accused no. 1 and Dungarsing, Thansing and Ransing had given stick blows. She has stated that the accused no. 2 Mandansing was given a blow with an axe by Champaksing. According to her, she was given stick blows by Thansing and Dungarsing and her hand was fractured. The trial court has ignored the version of Haluba on the ground that the F.I.R. exh. 51 which was filed by the accused persons against the complainant's party did not disclose any attack on Haluba. The medical certificate exh. 67 is a contemporaneous record and clearly shows that Haluba was injured on 13th July, 1992 before she was brought to the hospital at 9.30 p.m. She remained in the hospital for about 10 days. All the other accused persons were also having injuries including incised wounds. It, therefore, appears that there was a fight in which the blows were dealt by both the sides and the accused persons had given sword blows to Dungarsing and Champaksing, which resulted in the death of Dungarsing and grievous hurt with a sharp cutting instrument to Champaksing. In our opinion, therefore, the murder of Dungarsing was committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel; and, having regard to the facts and circumstances of the case and the nature of fight that

took place, it cannot be said that the accused persons had acted in a cruel or unusual manner. They had not assaulted Thansing and Ransing and had run away after the incident with their swords. The accused nos. 1 and 2 who have been found guilty of murder punishable under Sec. 302 of the Indian Penal Code are, therefore, in our opinion, entitled to the benefit of Exception 4 to Sec. 300 of the Indian Penal Code and the offence that they have committed would be culpable homicide not amounting to murder since each of the two injuries caused to Dungarsing on his head and scapular region was, as per the medical opinion, capable of causing his death, in ordinary course of nature. It appears that the trial court has, therefore, held the accused nos. 1 and 2 individually guilty of the offence under Sec. 302 of the Indian Penal Code. There was already a charge on all the accused of Sec. 302 read with Sec. 34 of the Indian Penal Code and it would have been appropriate for the trial court to resort to Sec. 34, even when the said two separate injuries were found to have been inflicted by the accused nos. 1 and 2 which were capable of causing death. The manner in which these two injuries were given on the vital part of the body of Dungarsing by the accused nos. 1 and 2 coupled with the fact that they had come together with swords and had gone away together was sufficient to attribute common intention to them to intentionally cause the death of Dungarsing, which could have even developed on the spur of the moment when the quarrel started. We would, therefore, alter the conviction of the accused nos. 1 and 2 to Sec. 304 Part-I read with Sec. 34 of the Indian Penal Code instead of Sec. 302 of the Indian Penal Code.

16. As regards the accused no. 3, it is clear that he did not give any blow to Dungarsing and he interfered only when Champaksing and Thansing joined the fray. Champaksing was having an axe. The incised wounds on some of the accused persons supports their version that he was having a sharp cutting instrument which could be an axe. The accused no. 3, therefore, gave a sword blow on the head of Champaksing and thereafter on his left toe with it. We, therefore, do not find sufficient reason for holding the accused no. 3 guilty of the offence under Sec. 304 Part-I read with Sec. 34 of the Indian Penal Code. He was rightly convicted by the trial court for the offence under Sec. 326 of the Indian Penal Code and imposed an adequate sentence. The acquittal appeal against the accused no. 3 must, therefore, fail. We therefore pass the following order :

O R D E R

CRIMINAL APPEAL NO. 855 OF 1994

The appeal is partly allowed.

a) The conviction of the accused no. 1 Thakor Dayalsing Dohji and the accused no. 2 Thakor Mandansing Dohji is altered from Sec.302 of the Indian Penal Code to Sec.304 Part-I read with Sec.34 of the Indian Penal Code and the sentence of life imprisonment imposed on them for the offence under Sec. 302 of the Indian Penal Code and a fine of Rs. 5,000/- is set aside and instead each of them is ordered to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,000/-, in default to undergo further rigorous imprisonment for a term of one month for the offence under Sec. 304 Part-I read with Sec. 34 of the Indian Penal Code.

b) The conviction and sentence imposed on the accused no. 1 Thakor Dayalsing Dohji and accused no. 3 Thakor Balvantsing Dohji for the offence under Sec. 326 of the Indian Penal Code stands confirmed.

Criminal Appeal no. 1084 of 1994

The acquittal appeal filed by the state against the original accused no. 3 Thakor Balvantsing Dohji is dismissed.

(R.K.ABICHANDANI, J)

(SHARAD D DAVE, J)

srilatha